Part II
District-by-District Descriptions

What Is in Part II?

In Part II, we provide a district-by-district description of current ADR and settlement procedures in each of the ninety-four district courts.[19] Although our main focus in these descriptions is court-wide practices, we also note procedures used by only one or a few judges and those planned but not yet established. Likewise, we cover both court-managed programs and private programs that receive case referrals from the court, as well as programs that are formally authorized and those that are not. We also indicate where common practice regarding ADR or settlement may deviate from the court's written procedure or rule.

For each court, we first give an in-brief description that provides an overview of the ADR and settlement practices in that court. Where a court offers a judge-based, nonprogrammatic ADR procedure, we describe it as fully as possible based on the materials provided by the court. The summary also notes whether a court has adopted extra ADR obligations for attorneys, has evaluated its ADR programs, has published an ADR brochure, or anticipates further ADR developments.

Where a court has developed court-wide, formal rules and procedures for the use of ADR and conducts the day-to-day operation of the program—that is, for courts with what we call court-based ADR programs—the in-brief description is followed by an in-depth description summarizing the key elements of these programs.[20] Each in-depth description first provides a short summary description of the ADR procedure, including its authorization, the date of adoption, and the number of cases referred during our survey period. It then summarizes such key elements as the kinds of cases eligible for ADR, the method for referring cases to ADR, the timing of the ADR session, whether the outcome is

19. ADR programs, particularly mediation, have also been instituted in a growing number of U.S. bankruptcy courts, including all four bankruptcy courts in California, the Middle and Southern Districts of Florida, the Southern District of New York, the Eastern District of Pennsylvania, and the District of Utah. In addition, almost all of the federal courts of appeals have settlement programs involving mediation. The Federal Judicial Center is preparing a sourcebook on the appellate programs. For information about both the appellate and bankruptcy programs, contact the Research Division at the Federal Judicial Center (202-273-4070).

20. In addition to having court-wide, formal rules and procedures, most programs we classify as court-based also rely on nonjudicial neutrals, such as attorneys, for the ADR service. When courts rely instead on district or magistrate judges for the ADR service—as they do in summary jury trials, two early neutral evaluation programs, and in several mediation programs—they generally have not developed detailed, court-wide rules for these procedures but leave the execution of the process to the individual judge. Even though we used detailed rules and procedural guidelines as the primary criterion for identifying court-based ADR programs, the reader should not infer that courts with such rules and guidelines necessarily have a fully operational program in place. Some courts with extensive rules and guidelines may not yet have implemented their programs or may have done so on only a limited, experimental basis. This information is noted in the in-depth descriptions.

reported to the assigned judge, whether fees are required, the selection and training of neutrals for the court's roster, and assignment of neutrals to cases.

The information in our descriptions is based in part on a questionnaire we sent to each federal district court in 1994, asking the court to describe its ADR and settlement practices, policies, and plans as comprehensively as possible.[21] We also reviewed copies of all pertinent court rules, orders, and other documents. Where necessary, we made follow-up telephone calls. Each court had an opportunity to review and update our draft descriptions; we accepted revisions through the summer of 1995.

Because change has been a constant in ADR during the past several years, the reader should keep in mind that the picture in some courts may already be slightly different from the one sketched here. Practitioners who use this sourcebook should not substitute it for a careful reading of local rules, CJRA plans, and other court ADR documents. These cautions notwithstanding, this sourcebook provides a comprehensive guide to ADR and settlement procedures in the federal district courts.

Definitions and Key Features of ADR and Settlement Processes in the Federal District Courts

One of the challenges in studying ADR and settlement practices nationwide is the field's unsettled and evolving vocabulary. Different courts, judges, and litigants ascribe different meanings to commonly used words like mediation, arbitration, and settlement conference. The uncertainty may reflect lack of familiarity with dispute resolution concepts, simple misuse of standard dispute resolution terminology and concepts, historical developments, or regional differences.[22]

Misnomers are found even in newly established programs. For example, a new settlement program in a district may be called arbitration in the court's

21. Because some court rules, documents, and survey responses were much more detailed than others, our descriptions vary accordingly. Where a procedure depends on the individual judge's directions in the particular case—e.g., settlement conferences in many courts and summary jury trials generally—the spokesperson for the court may not have been in a position to provide more than a general answer.

22. A classic example of historical and regional developments is "mediation" in the two district courts in Michigan. These programs, which are based on a long-standing state program called "mediation," more closely resemble nonbinding arbitration or case valuation. While the well-known Michigan process causes little confusion among the judges and litigants in that state because of its long use, those outside the state would be misled by the term. To minimize confusion, the federal courts now refer to the process as "Michigan mediation." In the sourcebook we classify it as case valuation.

literature, even though the court's local rule describes a facilitated negotiation process that sounds like mediation. In this sourcebook, where the process or program name used by a court deviates substantially from general usage, we use the generally accepted name but also note the name used by the court.

Other ambiguities come from the procedural flexibility inherent in many ADR processes, especially facilitative procedures like mediation or settlement conferences. The way in which a skillful attorney-mediator or settlement judge, for example, practices the "art of settlement" often varies from case to case and from neutral to neutral. Most courts do not specify which techniques the mediator or settlement judge should use to conduct the mediation session or settlement conference, generally leaving the choice of settlement strategies to the neutral. As a consequence, a mediation session or settlement conference in one district or with one neutral may look very different from the same settlement event in another district or with another neutral.

The unsettled terminology raises basic questions of whether the ADR processes used in the federal courts share core defining attributes. For example, are judicial settlement conferences across the districts more alike or different? Is mediation with attorney-mediators the same as mediation with judicial officers? Is mediation by the trial judge different from mediation by another judge, especially one whose primary responsibility is settlement? What is early neutral evaluation, and how does it differ from mediation or from early case management conferences? Without a far more extensive examination of ADR and settlement practices, we cannot answer these questions definitively, but we can provide the generally accepted definitions of the principal forms of ADR and settlement offered by the courts and surveyed in this guide.[23]

Arbitration

Court-annexed arbitration is an adjudicatory process in which one or more attorney arbitrators issue a nonbinding judgment on the merits after an expedited, adversarial hearing in which attorneys for each party present their cases. Witnesses are not called but exhibits may be submitted. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the nonbinding ruling and proceed to a trial de novo.

Most of the federal court arbitration programs were established under federal statute, 28 U.S.C. §§ 651–658, which authorizes ten federal district courts to establish mandatory arbitration programs in which litigant participation is presumptively mandatory and another ten districts to implement voluntary programs in which parties participate by choice. Two districts with statutory mandatory arbitration programs (Western District of Michigan and Western Dis-

23. For a discussion of benefits and concerns relative to many of these ADR methods, see Elizabeth Plapinger et al., Judge's Deskbook on Court ADR (CPR Institute for Dispute Resolution 1993).

trict of Missouri) have made arbitration one of several ADR options offered by the courts; one (Middle District of North Carolina) has discontinued its program. Of the ten courts authorized to establish voluntary arbitration programs, two (Western District of Kentucky and Western District of Virginia) have chosen not to implement the program. Under the CJRA, a few courts have established arbitration programs independently of the statutory umbrella or hope to institute arbitration programs with appropriate statutory authorization. The future of the statutory arbitration programs is the subject of ongoing congressional debate (*see supra* note 18).

The statutory arbitration programs are the most uniform of all ADR programs in the federal district courts. The key attributes of the procedure generally are the following.

Referral. In mandatory arbitration programs, eligible cases are generally referred automatically to arbitration at filing by court order. Eligible cases typically include contract and tort cases of $100,000 or less (a few courts have a higher cap of $150,000). In most mandatory programs, litigants in other case categories are permitted to volunteer for arbitration by agreement of all parties and with the consent of the assigned judge, and in all programs litigants automatically referred to arbitration are permitted to request removal from the process. In voluntary programs, litigants in eligible cases either request referral to arbitration by opting in or are permitted to freely opt out of an automatic referral.

Arbitrator. The arbitrators are lawyers who meet qualification standards set by the court. In most courts, the parties may decide whether a single arbitrator or a panel of three arbitrators will preside. In the statutory arbitration programs, arbitrators are generally paid nominal fees by the court. In nonstatutory programs, the arbitrator may serve without compensation or may be compensated by the parties.

Hearing. The arbitration hearing is generally held after completion of discovery and rulings on dispositive motions. At the hearing, which typically lasts about four hours, each side presents its case under relaxed rules of evidence. Most courts require party attendance at the hearing and authorize use of sanctions for failure to comply.

Decision. After the hearing, the arbitrator issues a decision on the merits and, where appropriate, determines an award. The decision is nonbinding and kept under seal until the period for requesting a trial de novo has passed.

Trial de novo. Parties dissatisfied with the decision may request a trial de novo with the assigned judge. The trial proceeds as though the arbitration had not occurred. In some courts, trial requests must be accompanied by a sum equal to the arbitrator's fees, and if the party requesting the trial does not improve on the arbitrator's award, the deposited sum is forfeited.

Judgment. If a trial de novo is not demanded, the arbitration award becomes the nonappealable judgment of the court.

Case Valuation ("Michigan Mediation")

This hybrid ADR process provides litigants in trial-ready cases with a written, nonbinding assessment of the case's judgment value, delivered by a panel of three attorneys after a short hearing. If the panel's valuation is accepted by all parties, the case is settled for that amount. If any party rejects the panel's assessment, the case proceeds to trial. Used in the federal and state courts in Michigan, this arbitration-like process is also known as "Michigan Mediation."

In the Eastern District of Michigan, almost all civil cases seeking primarily money damages are eligible for referral. The most common referrals involve contract, personal injury, and civil rights cases. In the Western District of Michigan, all civil cases are eligible for referral; in certain diversity, medical malpractice, and tort cases, referral is mandatory.

Court Minitrial

The minitrial is a flexible, nonbinding ADR process. Although used primarily out of court, in the past decade a few federal district judges have developed their own version of the minitrial. Like the summary jury trial (see below), the court minitrial is a relatively elaborate ADR method, generally reserved for large disputes and used sparingly in the federal courts.

In a typical court minitrial, each side presents a shortened form of its best case to settlement-authorized representatives of the parties to the dispute. Since this procedure is used primarily for business litigation, the representatives are usually the companies' senior executives. The hearing is informal, with relaxed rules of evidence and procedure and no witnesses. In court settings, a judge, magistrate judge, or nonjudicial neutral may preside over the one- or two-day hearing. Following the hearing, the client representatives meet, with or without the neutral, to negotiate a settlement. At the parties' request, the neutral advisor may assist the settlement discussions by facilitating discussion or by issuing an advisory opinion. If the parties reach an impasse, the case proceeds to trial.

Early Neutral Evaluation

Early neutral evaluation (ENE) is a nonbinding ADR process designed to improve case planning and settlement prospects by providing litigants with an early advisory evaluation of the likely court outcome. Case planning and settlement assistance may also be offered during the session, which is generally held before much discovery has been taken. In ENE, a neutral evaluator (usually a private attorney with expertise in the subject matter of the dispute) holds a confidential session with parties and counsel early in the litigation to hear both

sides of the case. The evaluator helps the parties clarify arguments and evidence, identifies strengths and weaknesses of the parties' positions, and gives the parties a nonbinding assessment of the case's merits. Depending on the goals of the program, the evaluator may also mediate settlement discussions or offer case planning assistance.

Like mediation, ENE is thought to be widely applicable to many types of civil cases, including complex disputes. The process was originally designed to improve attorneys' pretrial practices, and in some courts, most prominently the Northern District of California where the process originated, ENE retains its original purpose of improving case development. In other courts, such as the District of Vermont, ENE is used primarily as a settlement device and resembles evaluative mediation.

Typically, the ENE process moves through the following steps.

Referral. Some ENE programs compel specific categories of civil cases to participate in ENE and refer these cases to ENE automatically at filing. In other courts, ENE referrals are made on a case-by-case basis by the assigned judge, with or without the approval of the litigants.

Evaluator. Early neutral evaluators are generally experienced litigators who are expert in the subject matter of the case. Trained and certified by the court, evaluators in most districts serve without compensation, at least for an initial session. In other districts, the parties pay the evaluators their market rate or a court-set fee. Depending on the program, the evaluator is selected by the parties or assigned to the case by a court administrator. In two districts, the Southern District of California and the District of Nevada, judges conduct the ENE sessions.

Preparing for ENE. Before the conference, parties are usually required to submit to the evaluator and other parties court documents and memoranda describing the dispute.

ENE conference. The ENE session usually begins with the evaluator explaining the process and outlining the procedures. Each side then makes a short opening statement summarizing the facts, legal contentions, and evidence. Following the opening statements, the evaluator may ask open-ended questions of both sides, attempt to clarify arguments, explore evidentiary gaps, and probe strengths and weaknesses. The evaluator helps the parties analyze their positions and identify key areas of agreement and disagreement. The evaluator then prepares a written evaluation of the case and presents it to the parties. (In some courts the parties may choose not to hear the neutral's evaluation.) The evaluator may also facilitate settlement discussions before or after the case assessment is issued. If settlement discussions are not successful, the evaluator may help the parties plan the next stages of the case. Where settlement is the chief purpose of the conferences, the evaluator may meet separately with each side, although in some programs separate meetings are not permitted. Clients usually participate

in the confidential ENE sessions, which typically last around three to four hours. Follow-up sessions may also be held.

Concluding the ENE. Unless the case settles at the confidential ENE session, the case continues through the court's regular procedures.

Judge-Hosted Settlement Conferences

The most common form of settlement assistance used in federal courts is the settlement conference presided over by a district or magistrate judge. Almost all ninety-four of the federal district courts use judicial settlement conferences; close to a third of the courts assign this role primarily to magistrate judges.

The classic role of the settlement judge is to give an assessment of the merits of the case and to facilitate the trading of settlement offers. Some settlement judges also use mediation techniques in the settlement conference to improve communication among the parties, probe barriers to settlement, and help formulate resolutions. In some courts, a specific district or magistrate judge is designated as the *settlement judge.* In others, the assigned district judge—or, as is sometimes the case in bench trials, another judge who will not hear the case—hosts settlement conferences at various points during the litigation, often just before trial. The appropriate role of judges in settling cases on their own dockets is a matter of some debate among judges and attorneys.

Mediation

Mediation is a flexible, nonbinding dispute resolution procedure in which a neutral third party—the mediator—facilitates negotiations between the parties to help them settle. A hallmark of mediation is its capacity to help parties expand traditional settlement discussions and broaden resolution options, often by going beyond the legal issues in controversy. Mediation sessions are confidential and structured to help parties communicate—to clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options. The mediator, who may meet jointly or separately with the parties, serves as a facilitator and does not issue a decision or make findings of fact. In the federal district courts, the mediator is usually an attorney approved by the court, though in some districts magistrate judges, and occasionally district judges, have been trained in mediation techniques and serve as mediators.

As mediation develops, distinct mediation strategies are emerging. In classic mediation, the mediator's mission is *facilitative*—to help the parties find solutions to the underlying problems giving rise to the litigation. In this kind of mediation, the mediator is primarily a process expert, rather than an expert in the subject matter of the litigation. In *evaluative* mediation, the mediator uses case evaluation—i.e., an assessment of potential legal outcomes—as a primary settlement tool. Evaluative mediation is similar to early neutral evaluation and

requires mediators who are experts in federal litigation and in the subject matter of the case.

Although most courts do not specify which mediation approach they practice, some do. The mediation program in the Northern District of Oklahoma, for example, uses both facilitative and evaluative tools. The mediator first facilitates party negotiations and then, if necessary or desired, offers an evaluation of the case. Where the mediation approach is clear from a court's materials, we report it, recognizing that the actual practices of individual mediators may vary.

Regardless of which mediation model a court or mediator follows, most mediations progress through the following stages.

Referral. In most courts, cases are screened by the assigned judge for referral to mediation, usually in conjunction with the parties at early case management conferences. Although the parties are generally involved in the decision whether to mediate—and may, in many courts, play a critical role—most mediation programs authorize judges to refer cases to mediation without party consent. In a few courts, most civil cases are routinely referred to mediation, but in most others mediation is used on a case-by-case basis or targeted at specific kinds of disputes. Almost all courts exclude certain categories of cases from mediation, such as administrative appeals, prisoner civil rights cases, and writs. The timing of the referral varies and generally is left to the judge.

Mediator. The mediator is usually a lawyer (or an expert from another discipline) who meets the qualifications and training standards set by the court. In some mediation programs, litigants select a mediator from the court's roster or, with the court's approval, from another source. In other programs, a court administrator or judge selects the mediator. In the majority of federal court programs the parties pay the mediator his or her market rate or a court-set fee, although in some the attorney-mediator serves without compensation.

Preparation for mediation. To educate the mediator about the litigation, parties are usually required or encouraged to submit to the mediator copies of relevant court documents, along with a short memorandum of legal, factual, and settlement positions. Courts vary as to whether the premediation submissions are exchanged among all parties. Typically, the submissions are not included in the court files and are returned to the parties at the close of the mediation.

Mediation sessions. Depending on the goals of the program and needs of the case, mediation can involve a single session of several hours or multiple sessions over time. In addition to counsel, most courts require parties or insurers to attend the mediation session and authorize sanctions for failure to comply with mediation procedures. At the initial session, the mediator explains the mediation process, hears short presentations about the case from each party, and asks questions to clarify positions and interests. In most programs, the mediator then meets privately with each side (generally party and counsel, but

sometimes party or counsel separately), to explore each party's underlying interests, to probe the strengths and weaknesses of legal positions, and to help them determine which interests or goals are most important. These private meetings are usually called caucuses. In later separate and joint sessions, the mediator helps the parties generate ideas and evaluate alternative proposals. In courts with evaluative mediation, practice differs as to whether predictions of court outcome or case evaluations are offered in joint or separate sessions.

Completion of the mediation. Some court rules specifically authorize the mediator to end the mediation session or declare an impasse, but most are silent on the question. If the parties reach settlement, the mediator may prepare an outline of the agreement for later completion by counsel. If complete settlement is not possible, the mediator may help the parties seek partial agreements or consider their next steps. If no agreement is reached, the case returns to the trial track.

Multi-Door Courthouse or Multi-Option ADR

These terms describe courts that offer an array of dispute resolution options. Some multi-door courthouses refer all cases of certain types to particular ADR programs, while others offer litigants a menu of options. Multi-door courthouses have been established in state courts in New Jersey, Texas, Massachusetts, and the District of Columbia. In the federal court system, several courts, including the Northern District of Ohio, the Northern District of California, and the District of Rhode Island, now have multi-option ADR programs.

Settlement Week

In a typical settlement week, a court suspends normal trial activity and, aided by bar groups and volunteer lawyers, sends numerous trial-ready cases to mediation conferences held at the courthouse and conducted by attorney-mediators. Mediation sessions may last several hours, with additional sessions held as needed. In the federal district courts, settlement weeks are used regularly only in the Southern District of Ohio and the Northern District of West Virginia, with a third program just starting in the Western District of New York. Settlement weeks are used more widely in the state courts, and a few federal districts refer cases to state-court-sponsored settlement weeks. Cases unresolved during settlement week return to the court's regular docket for trial.

Summary Jury Trial

The summary jury trial (SJT) is a nonbinding ADR process presided over by a district or magistrate judge and designed to promote settlement in trial-ready cases. The process provides litigants and their counsel with an advisory verdict after an abbreviated hearing in which evidence is presented to a jury by counsel

in summary form. Witnesses are generally not called. The jury's nonbinding verdict is used as a basis for subsequent settlement negotiations. If no settlement is reached, the case returns to the trial track.

Developed in the mid-1970s by former Chief Judge Thomas D. Lambros (N.D. Ohio), the summary jury trial is authorized in many federal districts but used only occasionally. Some judges use this resource-intensive process only for protracted cases, others for routine civil litigation where litigants differ significantly about the likely jury outcome. A district judge or magistrate judge usually presides over the summary jury trial. A variant of the SJT is the summary bench trial, in which the presiding district judge or magistrate judge issues an advisory opinion. Part or all of a dispute may be submitted to a summary jury trial or a summary bench trial.

Like other ADR processes, the summary jury trial is a flexible process intended to be adapted to the needs of an individual case. Summary jury trials are typically used after discovery is complete and often include the following steps:

Preparing for the SJT. Before the hearing, the court may require counsel to submit trial memoranda, proposed voir dire questions, proposed jury instructions, and motions in limine. If extensive presentations are expected, the court may also require the parties to submit lists of exhibits and witnesses whose testimony will be summarized during the proceeding.

Voir dire. On the day of the summary jury trial, prospective jurors are called from the regular jury pools. Limited voir dire is conducted and a six-person jury is seated. Jurors are told of their advisory role either at the start of the process or after they render a verdict.

Hearing. The summary jury trial is generally presided over by a judge and conducted like an expedited adversarial hearing. Clients generally attend. Depending on the complexity of the case, a summary jury trial hearing may be completed in a day or may take one or two weeks. Opening and closing statements are presented, and narrative presentations of admissible evidence are made by counsel. Live witnesses are generally not permitted, although videotaped testimony may be allowed. Evidentiary objections are usually addressed before the hearing, although disagreements about the accuracy of the lawyers' representations are resolved by the presiding judge at the hearing. After closing arguments and jury instructions, the jury retires to deliberate.

Verdict. Usually jurors are instructed to reach a unanimous decision, but if a consensus verdict cannot be reached, individual verdicts may be returned. In some courts, the judge and counsel are permitted to question the jurors after the verdict is announced.

Settlement negotiations. Settlement discussions can occur throughout the planning, hearing, and deliberation phases of the summary jury trial. After the advi-

sory verdict is issued, negotiations can begin immediately or start several days or weeks later if the parties need a cooling-off period or time to assess new information. Some judges play an active role in settlement negotiations; others leave the negotiation phase to counsel.

District-by-district summaries